

82-1833

Office - Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

ANGEL SANTIAGO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**Petition for a Writ of Certiorari to the Supreme Court of
the State of New York, Appellate Division, Second
Department**

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Questions Presented.

1. Whether Petitioner was denied a fair trial when the mother of the deceased in this murder case suddenly screamed aloud in the presence of the jury "I'm the mother . . . They killed my son. Both of them killed my son. I'm the mother. They killed my son!"? (Fifth and Fourteenth Amendments, U.S. Const.)

2. Whether the failure of the Trial Judge to grant a mistrial upon timely application of the Petitioner, when the mother of the deceased screamed out in front of the jury that he had killed her son, precluded a fair trial?

3. Whether a proper *voir dire* of the jurors was conducted when the Trial Judge simply asked the jurors *en masse*, and not separately and apart from each other, whether they had been prejudiced when they heard the mother of the deceased scream out in the courtroom that the Petitioner had killed her son?

4. Whether the evidence was sufficient to have warranted submission of this case to a jury? (Fourteenth Amendment, U.S. Const.)

Parties.

The parties to the proceeding in the Court below were THE PEOPLE OF THE STATE OF NEW YORK and ANGEL SANTIAGO.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

ANGEL SANTIAGO,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**Petition for a Writ of Certiorari to the Supreme Court of
the State of New York, Appellate Division, Second
Department.**

Opinion Below.

The Court below affirmed without opinion. The denial of leave to appeal by an Associate Judge of the Court of Appeals was also without opinion.

Jurisdiction.

Petitioner was charged with the crime of murder second degree and possession of a weapon in the second degree, in the Supreme Court, Kings County. After trial before

Honorable Aaron Bernstein and a jury, Petitioner was convicted of the crimes of manslaughter first degree and criminal possession of a weapon in the second degree, and sentenced to a term of 3 to 9 years imprisonment on the manslaughter charge, and to 1½ to 4 years concurrently on the weapons violation.

The charges were predicated upon a fight which degenerated into a general melee in the hallway of a Brooklyn apartment house, as a result of which the victim herein was killed. There was no unequivocal evidence that the Petitioner had fired the fatal shot, nor that he even possessed a gun.

The jurisdiction of this Court is invoked under Sections 1254 and 1257 of Title 28 of the United States Code.

The Appellate Division, Second Department, affirmed the judgment of conviction on the 28th day of February, 1983, and on the 24th day of March, 1983, an Associate Judge of the New York Court of Appeals denied leave to appeal.

Copies of the orders of the Appellate Division, and the certificate denying leave to appeal, are annexed as part of the appendix. No opinion was written by the Courts below.

Constitutional and Statutory Provisions Involved.

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein. Both of these Constitutional provisions are cited with respect to their requirement that no defendant in a criminal prosecution be deprived of life, liberty or property without due process of law.

In addition, Sections 125.20 and 265.03 of the New York Penal Law are also involved. The pertinent portions of those Sections are as follows:

PENAL LAW §125.20—Manslaughter in the first degree.

In pertinent part, this Section provides that a person is guilty of manslaughter in the first degree when “with intent to cause serious physical injury to another person, he causes the death of such person or to another person . . .”

Manslaughter in the first degree is a Class B felony.

PENAL LAW §265.03—Criminal possession of a weapon in the second degree.

This Section provides that a person is guilty of criminal possession of a weapon in the second degree when he possesses a loaded firearm with intent to use the same unlawfully against another.

Criminal possession of a weapon in the second degree is a Class C felony.

A *B* felony is punishable by up to 25 years imprisonment.

A *C* felony is punishable by up to 15 years imprisonment.

PENAL LAW §125.25—Murder in the second degree.

A person is guilty of murder in the second degree when, with intent to cause the death of another person, he causes the death of such other person or of a third person . . .

Murder in the second degree is an A felony.

An A felony is punishable by life imprisonment.

Historical Background of the Case.

The evidence at trial revealed that the Petitioner and a number of other persons, including the deceased, engaged in a general melee in the hallway of a tenement building in Kings County.

With the exception of one witness, whose credibility was severely impaired, no one was able to testify that the Petitioner had a gun.

Hilda Aponte, who was an admitted heroin addict and related to the deceased, was the sole witness who claimed that she saw Petitioner shoot a gun at the deceased. She conceded, however, at the trial, that her earlier testimony had been that she never saw a gun in Petitioner's hand and, in addition, that she had never told anyone about seeing the gun previously (330, 339; 353-356a)*.

Alicia Ortiz testified for the defense that she had spoken to this witness, Hilda Aponte, and was told that Hilda informed her that she really didn't know who had shot the guy but she didn't care because she wanted "someone to pay for her brother's death" (544).

During the trial, shortly before the charge to the jury and its deliberations, a woman suddenly stood up in the courtroom and shouted in open court in the presence of the jury:

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

"I'm the mother. Your Honor. I'm the mother. They killed my son. Both of them killed my son. I'm the mother. They killed my son!"

A motion for a mistrial was immediately made (570), but the Court declined to grant one.

Both the Court and the prosecutor, to say nothing of the defense counsel, conceded that the incident was extremely prejudicial (571).

At the time of the sentence, the Trial Judge indicated that he had severe reservations as to whether the defendant-petitioner was actually guilty, but refused to set aside the verdict. Thus, at the sentence (Sentence Minutes, pp. 4 and 5), the Trial Judge declared:

"I did hear the entire trial, and as you know, I'm sure you have conveyed it to your client Santiago I had heard the case. *I was not as convinced as the jury that the defendant fired the shot, but I don't make those decisions*, and if I were to set aside this verdict, I would be performing the function of a jury, which I am not entitled to do, and for me to do that would be error.

"Perhaps the Appellate Division, when it hears this appeal will reach a contrary conclusion, that the People didn't prove the case beyond a reasonable doubt.

"Because of the facts, and because of the fact the defendant submitted himself voluntarily to the lie detector test, established that he was—indicated that he was telling the truth, that he didn't commit the crime, that he didn't have the gun, . . ."

Reasons for Granting the Writ.

I.

The jurors were irretrievably prejudiced when the mother of the deceased suddenly stood up in open court and shouted that she was the deceased's mother and that the petitioner had killed her son. The Court and both parties conceded that there was severe prejudicial error committed, but nonetheless, a mistrial was denied. The general inquiry by the Court of the jurors, *en masse*, and not separately and apart from each other, was inadequate to mitigate the prejudice. Such misconduct affecting jurors requires a new trial before an impartial jury.

If the jurors in the case at bar had been exposed to newspaper publicity consisting of a quotation from a person purporting to be the mother of the deceased, announcing that the Petitioner had murdered her son, there would be little doubt but that severe prejudice would have occurred affecting the ability of the jurors to remain impartial. To say the very least, the Court would necessarily have had to inquire of each juror, separately and apart from the others, whether or not such publicity affected their ability to remain impartial (see *Marshall v. United States*, 360 U.S. 310, 3 L.Ed.2d 1250 [1959], and *United States v. Lord*, 565 F.2d 831, 2 Cir. 1977).

In the *Lord* case, the Court of Appeals aptly explained the rule as follows (565 F.2d at 838, 839):

"The guidelines to be followed by a district court confronted with the problem of publication or broadcast of information concerning an ongoing criminal trial have been indicated by us. See, e.g.,

United States v. Pfingst, 477 F.2d 177, 186 (2d Cir. 1973); *United States v. Bentvena*, 319 F.2d 916, 934 (2d Cir.), *cert. denied*, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963); *United States v. Aqueci*, 310 F.2d 817, 831-32 (2d Cir.), *cert. denied*, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). Accord, *United States v. Perrotta*, 553 F.2d 247 (1st Cir. 1977); *United States v. Pomponio*, 517 F.2d 460 (4th Cir. 1975); *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir. 1975); *Margoles v. United States*, 407 F.2d 727 (7th Cir. 1969); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968). See also American Bar Association Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press §3.5(f) (1968). First the court must decide whether the publicity contains potentially prejudicial information, and whether the members of the jury might have been exposed to it. If the broadcast or article contains no information beyond the evidence in the case, or if the information is clearly innocuous or the possibility of the jury's exposure to it is remote, further inquiry may not be necessary. If, however, the court determines that the article or broadcast has a potential for unfair prejudice, then an initial inquiry of the jury is necessary to ascertain whether any of its members have been exposed to the information. Any juror who responds that he or she has been so exposed should be *examined individually, out of the presence of the other jurors, to determine the extent of the exposure and its effect on the juror's attitude toward the trial*. This precautionary procedure should permit the court to determine what further steps, if any, are required to insure that the trial proceeds fairly." (Emphasis ours.)

In the case at bar, a much more dramatic thing occurred than newspaper publicity.

In open court, in the presence and hearing of all the jurors, a woman, announcing herself as the mother of the deceased, shouted accusatorially that the Petitioner had killed her son, and said it more than once.

The Court did not ameliorate this prejudice by granting a mistrial, but instead, questioned the jurors *en masse*, and not separately and apart from each other, as to whether they were prejudiced. He, of course, told them to disregard the outburst.

We must bear in mind, however, that these jurors had to come into the courtroom and face this mother, and how difficult would it be for anyone to face the mother of a person who was killed and announce a "not guilty" verdict.

In addition, it is inconceivable that the jurors could not have been prejudiced by this, or that the simple inquiry by the Court, without careful and separate interviews, could possibly have ameliorated the prejudice.

In the *Marshall* case, it should be noted that the Supreme Court of the United States indicated that where only three jurors had read a news article that was prejudicial to the defendant, a reversal of the conviction was required. In making an analogy in the *Marshall* case, the Supreme Court indicated that such outside publicity was "almost" as bad as having it introduced in evidence at the trial.

In the case at bar, as this Court will note, the mother of the deceased stood up in open court in the presence of all the jurors and screamed that the Petitioner had killed her son, that she was the mother, and repeated it.

Unlike what was done in the *Marshall* decision, the Court herein did not poll the jurors separately and apart from each other, but, instead, inquired *en masse* as to whether or not they had suffered prejudice. Such a *voir dire* of the jurors after such an incident is incapable of rectifying the prejudice.

In *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663, the Supreme Court of the United States emphasized that it was essential that a defendant in a criminal case receive a fair trial before an impartial jury. Once a jury has been tainted with extraneous evidence or publicity of a virulent type, it is impossible to assure a fair trial to an accused from that point on.

In the case at bar, obviously, all twelve jurors heard the accusations of the mother and, on top of it, knew that they would have to face that mother when they came out to announce their verdicts. Under the circumstances, we maintain that it was impossible to have a fair trial.

The only remedy was a mistrial, which was timely requested, and which the Court reluctantly denied after the prosecution assured the Judge that it would try to protect him on an appeal.

II.

The evidence at trial consisting of the equivocal testimony of the sister of the deceased, who alone identified the defendant as the killer, was insufficient and inadequate as a matter of law to have been presented to a jury for deliberations. The Court failed to exercise its judicial functions, which should have been to dismiss at the close of the prosecution's case, because of insufficiency of evidence. This is illustrated further by the fact that at sentence the Trial Judge expressed grave misgivings about the guilt of the Petitioner.

The evidence at trial, as revealed by the sentiments expressed by the Trial Judge at the time of sentence, was grossly insufficient to have warranted presentation of the case to a jury. Only one witness, namely the deceased's sister, gave an equivocal statement that the Petitioner was the killer. She conceded that she had given inconsistent testimony previously, and another witness informed the jurors in court that Hilda Aponte, the sole witness to whom we referred, had indicated that she was inventing the story and merely wanted someone to pay for her brother's death.

We believe that *United States v. Taylor*, 464 F.2d 240 (2 Cir. 1972), graphically epitomizes the functions of a Trial Judge under such circumstances:

"It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See *Capital Traction Company v. Hof*, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must

determine whether the proponent had adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence §2494 at 299 (3d ed. 1940), the best statement to the test to be that of Mr. Justice Brett in *Bridges v. Railway Co.* [1874] L.R. 7 H.L. 213, 233:

“[A]re there facts in evidence which if answered would justify men or ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?

“It would seem at first blush—and we think also at second—that more ‘facts in evidence’ are needed for the judge to allow men, and now women, ‘of ordinary reason and fairness’ to affirm the question the proponent ‘is bound to maintain’ when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. *In re Winship*, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). We do not find a satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury.”

We believe, therefore, that the Trial Judge abdicated his responsibilities, as indicated by his sentiments at sentence, that he was very much disturbed by the sufficiency of evidence against the defendant-petitioner.

Under these circumstances, this Court should set guidelines for judges, who should be admonished not to

present cases to lay jurors when they feel that there is a reasonable doubt that is clearly presented by the evidence and thus jurors should not be permitted to speculate on guilt under those circumstances.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK and
MICHAEL M. CHASEN
Attorneys for Petitioner

IRVING ANOLIK
Of Counsel

APPENDIX.

Certificate Denying Leave to Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

Before: Hon. Richard D. Simons, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

against

ANGEL SANTIAGO

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 24, 1983

RICHARD D. SIMONS
Associate Judge

*Description of Order: Appeal from an order of the Appellate Division, Second Department, dated February 28, 1983 which affirmed a judgment of Supreme Court, Kings County, entered February 9, 1982.

**Order of the Appellate Division, Second Department,
Dated February 28, 1983.**

At a Term of the Appellate Division of the
Supreme Court of the State of New York,
Second Judicial Department, held in Kings
County on February 28, 1983.

Hon. Vito J. Titone,
Justice Presiding,
Hon. Frank A. Gulotta,
Hon. Moses M. Weinstein,
Hon. Lawrence J. Bracken,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

ANGEL SANTIAGO,

Appellant.

3510/80

In the above entitled action, the above named Angel Santiago, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered February 9, 1982; and the said appeal

having been argued by Irving Anolik, Esq., of counsel for the appellant, and argued by Bruce B. Berger, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that this case is hereby remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Certification.

I, IRVING ANOLIK, a member of the bar of this Court, certify that a copy of the within Petition was duly served by First Class Mail on the 10th day of May, 1983, on the District Attorney, Kings County, by depositing a true copy thereof in a depository of the United States Post Office, addressed to the District Attorney, Kings County, Municipal Building, Brooklyn, New York 11201.

Dated: New York, New York
May 10, 1983.

IRVING ANOLIK

No. 82-1833

Office - Supreme Court, U.S.

FILED

JUN 27 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

ANGEL SANTIAGO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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June 23, 1983

Questions Presented

1. Whether, when a spectator exclaimed in the presence of the jury over the death of the murder victim, the Constitution requires the trial court to grant a motion for mistrial rather than giving curative instructions which were effective and to which there were no objections.

2. Whether the evidence was insufficient to warrant submission of the case to the jury.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the judgment of the Appellate Division of the New York State Supreme Court, Second Department, in this case. That judgment was not accompanied by an opinion. It is reported at 92 A.D.2d 618, 459 N.Y.S.2d 953 (1983).

Opinions Below

The judgment of conviction was affirmed, without opinion, in the court below. 92 A.D.2d 618, 459 N.Y.S.2d 953 (1983). Leave to appeal was denied by an Associate

Judge of the New York Court of Appeals on March 24, 1983. 58 N.Y.2d 1123 (1983).

Jurisdiction

The judgment of the Appellate Division of the New York State Supreme Court, Second Department was entered on February 23, 1983, affirming defendant's judgment of conviction, dated February 9, 1982. A certificate denying leave to the Court of Appeals was issued March 24, 1983. The petition for certiorari was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257.¹

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Fourteenth Amendment:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law

New York Penal Law § 125.20:

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or another person

New York Penal Law § 265.03:

¹ Petitioner also incorrectly invokes jurisdiction under 28 U.S.C. § 1254, which applies to review of a decision of a federal court of appeals.

A person is guilty of criminal possession of a weapon in the second degree when he possesses . . . a loaded firearm with intent to use the same unlawfully against another.

Statement of the Case

Introduction

Angel Santiago was convicted, after a jury trial, of Manslaughter in the First Degree and Criminal Possession of a Weapon in the Second Degree [New York Penal Law § 125.20 and § 265.03]. He was sentenced on February 9, 1982, to concurrent terms of imprisonment of from three to nine years for Manslaughter in the First Degree and from one and one-half to four and one-half years for Criminal Possession of a Weapon in the Second Degree. The conviction was affirmed without opinion by the Appellate Division, Second Department, 92 A.D. 2d 618, 459 N.Y.S. 2d 953 (1983). Leave to appeal to the Court of Appeals was denied. 58 N.Y. 2d 1123 (1983).

Defendant is presently at liberty pursuant to a stay of execution granted by the trial court, which has now expired. He is scheduled to surrender on June 23, 1983.

The Evidence at Trial

Angel Santiago was convicted for shooting Alex Aponte to death on June 19, 1979 during a fight in the hallway of the apartment house where they both lived. Defendant had accused Aponte of stealing televisions and stereos from his apartment. Aponte denied that he had been the burglar. Defendant and his brother² began beating Aponte

² The brother, Richard Santiago, was tried jointly with defendant and convicted of Criminal possession of a Weapon in the Fourth Degree. He was sentenced to a conditional discharge and did not appeal his conviction.

in full view of three witnesses: Hermino Alvarez, Nadine Guevarro and Hilda Aponte³ (Alvarez 141-147; Guevarro: 244-245, 248, 270; Aponte: 288-289).⁴ Hilda Aponte saw a gun in defendant's hand (Aponte: 295). She and Alvarez saw gunshot flashes emanating from defendant's hand as it was extended towards Aponte (Alvarez: 144-145, 153; Aponte: 294-296). At the moment of the first gunshot Guevarro was looking directly at Richard Santiago. She turned and saw defendant standing on the side of the elevator from where the sparks and noise emanated (Guevarro: 256). Before defendant left the scene defendant warned Alvarez that he would "get the same thing he [the victim] got" if Alvarez did not stop aiding the fatally wounded Aponte (Alvarez: 148, 226; Guevarro: 259).

The Spectator's Outburst

During summation by Richard Santiago's attorney an unidentified spectator yelled: "I'm the mother, your Honor. I'm the mother. They killed my son. Both of them killed my son. I'm the mother. They killed my son" (569). The spectator was immediately ushered out of the courtroom. The court denied the defendant's motion for a mistrial and immediately gave the jury the following curative instructions:

Ladies and gentlemen of the jury: You know in the beginning of this trial, we were only interested and our total aim was in making sure that the defendants received a fair trial by a fair and impartial jury.

Now you heard that outburst, in Court by the mother of the decedent, and I'm telling you now that as jurors you must disregard that and not

³ The sister of the victim.

⁴ Numbers in parentheses refer to pages of the trial record.

take into consideration when you go into your deliberations anything that she said. I'm going to ask you all to be able to look into the recesses of your mind, and ask you, do you feel that you can put aside and disregard totally what that woman said when she had her outburst in Court?

THE JURY: Yes.

THE COURT: You all assure me that you can do it, because [what] she said is totally not acceptable evidence, and you cannot under any circumstances consider it in the determination of the guilt or lack of guilt of these defendants.

You all will show me that?

Indicate that each juror has said so (573-574).

Defendant did not object to the sufficiency of the curative instructions or to the manner used by the court to poll the jury.

During the charge, the court re-emphasized the jury's responsibility to render a fair and impartial decision, uninfluenced by the spectator's outburst:

As jurors, your fundamental duties [sic] to determine from all the evidence that you have heard and the exhibits that have been submitted, what the facts are.

You, the jurors are the sole and exclusive judges of the facts. In that field you are supreme, and neither I nor anyone else can invade your province.

As the sole and exclusive judges of the facts, you will decide and determine what occurred or what did not occur on June 19, 1979 in the second floor hallway of premises 899 Montgomery Street in Brooklyn, and you will do it coolly, calmly, deliberately and without fear, or favor or passion or prejudice or sympathy or vengeance of any kind (694-695).

The law requires that your decision be made solely upon the competent evidence before you. Such items as I have excluded from your consideration were excluded because they weren't legally admissible.

I particularly draw your attention to your assurance to me that you will be able to dismiss from your minds the outburst of the decedent's mother in court yesterday. Her outburst was as a result of the emotion from her loss. Your decision cannot be based on emotion. Your decision must be based on admissible evidence. You have an obligation to your oath of office to do what you are directed to do by this charge (698).

Once again, defendant did not object to the sufficiency of the instructions (742-743).

Reasons Why The Writ Should Be Denied

1. The Court Below Correctly Determined That Curative Instructions Were Sufficient to Protect Defendant From Any Potential Prejudice Caused by the Spectator's Outburst, And Did Not Decide Any Question of Law Worthy of This Court's Review.

Defendant has not presented any issue of constitutional dimension for review by this Court. A well-established and crucial assumption underlying the system of trial by jury is that juries will follow the instructions given to them by the trial judge. *Parker v. Randolph*, 442 U.S. 62, 73 (1979); *Opper v. United States*, 348 U.S. 84, 95 (1954).

The exemplary action of the trial judge in giving clear and repeated instructions fully protected defendant's right to a fair trial before an impartial jury. In a proper exercise of his discretion the trial judge effectively and

decisively minimized the impact of the sudden outburst by the mother of the deceased.

The trial judge promptly, repeatedly, and clearly instructed the jury to disregard the incident totally. Defendant did not object to the sufficiency of these instructions or to those given subsequently during the regular charge. The jurors assured the court that they would not, under any circumstances, consider the outburst in determining the guilt of the defendants. Under those circumstances, it cannot be said that the trial court abused its discretion or violated any constitutional right of the defendant. *Christian v. United States*, 394 A.2d 1, 23 (D.C.C.A. 1978), *cert. denied*, 442 U.S. 944 (1979); *State v. Sorrells*, 33 N.C. App. 374, 235 S.E.2d 70 (1977). In affirming that decision the court below did not decide any question of law worthy of review by this Court.

Similarly, there is no merit to defendant's claim that general inquiry by the trial judge of the jurors *en masse* was constitutionally infirm. Defendant's reliance on *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), is misplaced. That was not a constitutional decision but rather an exercise of federal supervisory powers and has no relevance to this New York State conviction. Moreover, even under the rule of *Lord* there was no error here. In that case the Second Circuit held that when jurors have been exposed to newspaper publicity, it may be necessary to make individual inquiry into the extent of the publicity to which each individual juror was exposed.⁵ Under those conditions the court has to examine each juror individually to determine the extent of the exposure

⁵ In *Lord* and in *Marshall v. United States*, 360 U.S. 310 (1959), also relied upon by defendant, judgments of conviction were reversed because of the prejudice which resulted from the repeated exposure of jurors, outside of the courtroom, to newspaper reports of the trials or the crimes charged.

and what steps, if any, are required to insure that the trial proceeds fairly. Here, by contrast, the court witnessed the potentially prejudicial incident, and immediately and promptly did all that was required to protect defendant's rights. Indeed, defense counsel, who did not object, did not perceive any unfairness in the method of questioning.

Defendant has not raised any constitutional issue which warrants consideration by this Court.

2. The Defendant's Challenge to the Sufficiency of the Evidence Has No Merit, And In Any Event, Does Not Raise a Substantial Constitutional Question.

The evidence adduced at trial was plainly sufficient to support the trial court's decision to submit this case to the jury. There can be no constitutional error in that decision if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This standard gives full play to the responsibility of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the facts.

The record clearly establishes the evidence was sufficient to submit the case to the jury. An eyewitness testified that defendant had a gun in his hand and that the flashes from the gunshots which killed Alex Aponte emanated from the precise area into which defendant had extended his hand. The trial court properly refused to substitute for the jury its own determinations concerning the credibility of the witnesses and the weight to be accorded the evidence. *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 879 (1980).

Furthermore, this Court should decline to review defendant's claim because there is an adequate and independent state ground to support the decision of the court below. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Henry v. Mississippi*, 379 U.S. 443 (1965). The prevailing rule in New York, when there is doubt about the sufficiency of the evidence, is that a trial judge should submit the case to the jury. If the verdict is then set aside upon defendant's motion, the ruling can be appealed and, if appropriate, the verdict reinstated. This procedure avoids the problems of double jeopardy created when a motion is prematurely decided before submission of the case to the jury for its determination. *People v. Key*, 45 N.Y.2d 111, 120, 408 N.Y.S.2d 16, 22, 379 N.E. 2d 1147, 1152 (1978). Thus, the trial court followed settled state practice in submitting the case to the jury.

This case, which was decided upon well-settled rules of law, presents no issue for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: Brooklyn, New York
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Respectfully submitted,

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